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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN R. ROBINSON, PETITIONER

v.

STATE OF MISSISSIPPI

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. The question presented is whether a Mississippi statute that prohibits non-resident aliens from acquiring or holding land is inconsistent with applicable treaties of the United States.

1. Petitioner, a citizen of Canada, does not reside in the United States. In 1981, he purchased a tract of land in Mississippi for use in a drug smuggling scheme. Pet. 3; Pet. App. A3-A4. Following a criminal investigation by state and federal officials, the State of Mississippi filed a quo warranto information in state court seeking a declaration that the land was improperly owned by petitioner and should escheat to the State under Miss. Code Ann. § 89-1-23 (1972), which provides:

> Nonresident aliens shall not hereafter acquire or hold land * * *. All land held or acquired contrary to this section shall escheat to the state * * *.

In defense to this action, petitioner argued that the Mississippi statute contravenes an 1899 treaty between the United States and Great Britain[1] as later extended to Canadian citizens.[2] Petitioner contended that the treaty affords Canadian nationals the same right to own property in this country as is granted by the United States to citizens of the most favored nation and that, because an 1853 treaty between the United States and Argentina confers upon Argentine citizens the rights enjoyed by American citizens to acquire and dispose of property,[3] Canadian citizens are entitled to the same right as American citizens to hold property.

The state court rejected this contention (Pet. App. A3-A4). It found (*id.* at A4) that the United States-Great Britain treaty "does not authorize a non-resident Canadian citizen to hold and acquire real property in the United States in derogation of any state law" and "in no way affects the State's rights through its legislature to restrict the ownership of real property located within [its] boundaries." Accordingly, the court adjudged (*ibid.*) that petitioner's land "should escheat to the State of Mississippi" and that the sheriff "shall take the necessary and proper steps to escheat the land to the State." The Supreme Court of Mississippi affirmed (*id.* at A1).

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[1]Convention on Tenure and Disposition of Real and Personal Property, Mar. 2, 1899, United States-Great Britain, 31 Stat. 1939 *et seq.*

[2]Supplementary Convention on Tenure and Disposition of Real and Personal Property: Accession of Canada, Oct. 21, 1921, United States-Great Britain, art. I, 42 Stat. 2147. The supplementary convention followed this Court's decision in *Sullivan* v. *Kidd*, 254 U.S. 433 (1921), that the 1899 treaty did not apply to citizens of Canada.

[3]Treaty of Friendship, Commerce and Navigation, July 27, 1853, United States-Argentina, art. IX, 10 Stat. 1005.

2. Petitioner renews the argument that the United States-Great Britain and the United States-Argentina treaties entitle him to the same right as a United States citizen to own real property in this country and that the Mississippi statute conflicts with that treaty right by prohibiting non-resident aliens from holding or acquiring land. This argument is without merit and does not warrant further review.

It is a well-settled principle of international law that an alien's right to acquire, hold, and dispose of property is subject to regulation by the state where the property is located. 8 M. Whiteman, *Digest of International Law* 487-488 (1967). Although this principle may be altered by treaty, and a variety of treaty provisions in fact exist, "[i]n the more recent treaties the United States has not accorded nationals of foreign states the privilege of acquiring lands within American territory if such acquisition is opposed by local state law" (*id.* at 487). See also U.S. Dep't of State, *Digest of United States Practice in International Law 1976*, at 92 (1977).[4]

Article V of the treaty between the United States and Great Britain, upon which petitioner relies, provides (see page 2 note 1, *supra*; emphasis added):

> In all that concerns *the right of disposing* of every kind of property, real or personal, citizens or subjects of each of the High Contracting Parties shall in the Dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation.

By its terms, this provision is limited to the disposition of property and does not apply to the acquisition or holding of property. Thus, while the treaty confers "most favored

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[4]The Department of State has noted that "the great majority of states do not prohibit acquisition of immovable property by aliens." See 8 M. Whiteman, *supra*, at 487.

nation" status upon the citizens of the two countries, it does so only with respect to "the right of disposing of * * * property."[5]

For this reason, petitioner's reliance upon the United States-Argentina treaty of 1853 is misplaced. That treaty grants Argentines the same rights as Americans for "the acquiring and disposing of property" in the United States.[6] However, because the "most favored nation" provision in the United States-Great Britain treaty confers rights only with respect to the disposition and not the acquisition of property, it is unaffected by the clause in the United States-Argentina treaty regarding "the acquiring * * * of property." Taken together, the two treaties do no more than grant to Canadian citizens the same rights to dispose of property that American citizens enjoy. Accordingly, nothing in the United States-Great Britain treaty preempts the Mississippi statute prohibiting non-resident aliens to acquire or hold land.

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[5]Cf. *Zschernig* v. *Miller*, 389 U.S. 429, 431 n.2 (1968); *id.* at 450 (Harlan, J., concurring in the result); *Kolovrat* v. *Oregon*, 366 U.S. 187, 195 & n.13 (1961).

[6]The United States-Argentina treaty provides (see page 2 note 3, *supra*; emphasis added):

> In whatever relates to the police of the ports, the lading and unlading of ships, the safety of the merchandise, goods, and effects, and to *the acquiring and disposing of property* of every sort and denomination, either by sale, donation, exchange, testament, or in any other manner whatsoever, as also to the administration of justice, *the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties, and rights as native citizens*; and they shall not be charged in any of those respects, with any higher imposts or duties than those which are paid, or may be paid, by native citizens — submitting, of course, to the local laws and regulations of each country respectively.

Cf. *Kolovrat* v. *Oregon*, 366 U.S. at 192, 193.

The plain language of Article V is confirmed by the history of the ratification of the United States-Great Britain treaty. In the treaty submitted by President McKinley to the Senate for its advice and consent, the "most favored nation" provision in Article V referred to "the right of *acquiring or possessing or disposing* of every kind of property, real or personal."[7] Thereafter, the Senate gave its advice and consent to the treaty subject to three amendments, including the following deletion in the "most favored nation" provision:

> In Article V, on page 8, in line 7, strike out the words "acquiring or possessing or." [8]

Great Britain accepted the amendments and the instruments of ratification were exchanged on July 28, 1900.[9] Thus, in ratifying the treaty, the United States and Great Britain specifically agreed to delete from the "most favored nation" provision the references to "acquiring or possessing" property and thereby to limit the provision to "the right of disposing of * * * property." Petitioner's argument would read back into the treaty the very language that was deliberately eliminated.

The text and history of the United States-Great Britain treaty are also reinforced by the evident purpose of the accord. Bilateral treaties "negotiated before World War II

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[7] *Tenure and Disposition of Real and Personal Property*, S. Doc. 158, 56th Cong., 1st Sess. 4 (1900) (emphasis added).

[8] S. Res. of Mar. 2, 1900, 56th Cong., 1st Sess. This resolution was not printed in the Congressional Record or other Senate documents, but a manuscript copy can be found in the records of the Office of Treaty Affairs of the Department of State. The resolution is reproduced in the appendix to this memorandum, *infra*, 1a. See also 12 C. Bevans, U.S. Dep't of State, *Treaties and Other International Agreements of the United States of America 1776-1949*, at 246 n.1 (1974) (describing the Senate amendments).

[9] See 31 Stat. 1939 (headnote).

tend to be selective, apparently covering only those issues that had generated difficulty between the parties. * * * * * The older bilateral treaties are * * * [generally] specific in their provisions and * * * limited in their scope. They normally focus on the inheritance problem, which apparently was a persistent issue in the early part of this century. Many of them go no farther." F. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 Minn. L. Rev. 621, 657-658, 661 (1976). In that historical context, the "most favored nation" right to dispose of property pursuant to Article V can be understood as part of an effort to resolve the broader issue of inheritance by facilitating the sale or transfer of inherited property. Indeed, the other substantive provisions of the United States-Great Britain treaty are largely directed to various aspects of the problem of bequests and inheritances of property. The Mississippi prohibition on the acquisition or holding of land by nonresident aliens is not inconsistent with the purpose of the treaty to establish "most favored nation" status for the disposition of property.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[10]

REX E. LEE
Solicitor General

NOVEMBER 1984

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[10]It appears that this case could have been brought to the Court as an appeal under 28 U.S.C. 1257(2). However, petitioner has elected to seek certiorari under 28 U.S.C. 1257(3). Because further review is not warranted, the petition for a writ of certiorari should be denied.

DOJ-1984-11

APPENDIX

In Executive Session, Senate of the United States

March 22, 1900.

Resolved.

[Two-thirds of the Senators present concurring therein], That the Senate advise and consent to the ratification of the Treaty between the United States and Great Britain relating to the tenure and disposition of real and personal property, signed March 2, 1899, with the following

Amendments:

At the end of Article IV, on page 8, line 4, after "London" insert *by direction of the treaty making power of the United States.*

In Article V, on page 8, in line 7, strike out the words "acquiring or possessing or."

In Article VII, on page 10, in lines 12 and 13, strike out the words "within twelve months from the date hereof."

Attest:

Secretary